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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	**CC Docket No. 95-185**

OPPOSITION OF
THE TELECOMMUNICATIONS RESELLERS ASSOCIATION
TO PETITION FOR STAY PENDING JUDICIAL REVIEW

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the "Petition for Stay Pending Judicial Review" ("Petition") filed by U S WEST, Inc. ("U S WEST") in the captioned proceeding. In its Petition, U S WEST urges the Commission to stay the effectiveness of the Commission's *Third Order on Reconsideration*, FCC 97-295, (released August 18, 1997) ("*Third Reconsideration*"), in which the Commission (i) extended the existing

[1] TRA, an association of more than 525 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services.

obligation of incumbent local exchange carriers ("LECs") to provide requesting carriers with access to the same transport facilities used to carry incumbent LEC traffic so as to encompass all transmission facilities connecting incumbent LEC switches, and (ii) required incumbent LECs to permit requesting carriers purchasing unbundled shared transport and local switching to use the same routing table and transport links used to route and carry incumbent LEC traffic. U S WEST seeks the afore-referenced stay pending the outcome of yet another in a series of appellate actions the carrier has initiated in the U.S. Court of Appeals for the Tenth Circuit, claiming that in the absence of such action "[t]he Reconsideration Order will distort competition, prevent USWC from recovering its cost of complying with universal service obligations, and reduce the quality and reliability of USWC's services."[2] As TRA will demonstrate below, U S WEST has altogether failed to satisfy the exacting standard required to warrant grant of the extraordinary relief it requests here and, accordingly, its Petition should be summarily rejected.

I. INTRODUCTION

In U S WEST's view, the *Third Reconsideration* "obliterates the Act's bedrock distinction between access to unbundled network elements and the right to resell sevices," by "eliminating the disadvantages associated with purchasing unbundled network elements."[3] U S WEST argues that "the unbundling provisions of the statute entitle a new entrant to identify and obtain access to dedicated facilities or capacity on a route-by-route basis within an incumbent's network" and that by "abandoning the concept of network elements as specific, identifiable facilities or capacity, the Reconsideration Order . . . repudiates the Act's requirement that new entrants bear

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[2] U S WEST Petition at 15.

[3] Id. at summary & 10 (emphasis in original).

ordinary business risks when purchasing unbundled network elements."[4] Moreover, U S WEST contends that because "the particular elements needed for a particular call are combined when the call is set up and then uncombined when the call is completed," the "Reconsideration Order relieves new entrants of the obligation of combining the network elements they purchase."[5]

Having stated its case on the merits, U S WEST asserts that a stay is warranted because otherwise new entrants will be able "to underprice USWC and attract away its customers."[6] As a result, U S WEST continues, "USWC quickly will lose its ability to recover the universal service costs embedded in its rates for local service."[7] And "[t]he loss of this universal service support will harm not only USWC but the public interest as well."[8] Finally, U S WEST opines that "staying the Reconsideration Order will not prevent other carriers from competing with USWC or other cause them any substantial harm."[9]

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[10] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in

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4 Id. at 11 - 12.

5 Id. at 14 - 15.

6 Id. at 16.

7 Id. at 17.

8 Id. at 18.

9 Id.

10 *See, e.g.*, Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[11] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest.[12] While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[13]

US WEST has satisfied none of the four tests for grant of the extraordinary relief it seeks here.

II. ARGUMENT

A. U S WEST Has Failed To Demonstrate that It is Likely to Succeed on the Merits of Its Appeal

U S WEST's concept of network elements as "dedicated facilities or capacity on a route-by-route basis within an incumbent's network" conflicts with Section 251(c)(3),[14] the

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[11] *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

[12] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745, ¶ 7 (1996); Access Charge Reform (Order), CC Docket No. 262, FCC 97-216, ¶ 4 (released June 18, 1997).

[13] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 23; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

[14] 47 U.S.C. § 251(c)(3).

Commission's Local Competition Order,[15] and the decision of the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") in Iowa Utilities Board v. FCC.[16] The "network elements" Section 251(c)(3) requires incumbent LECs to unbundle "include[] features, functions, and capabilities that are provided by means of . . . [a] facility or equipment [used in the provision of telecommunications services], including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.'"[17]

The Commission properly interpreted this definition to encompass "physical facilities of the network, together with the features, functions and capabilities associated with those facilities."[18] The access to a network element acquired under Section 251(c)(3), as the Commission explained, can be "exclusive . . . for a specific period" as in the case of a loop, or it can be on a "minute-by-minute basis" for "shared facilities such as common transport."[19] And such access encompasses "logical," as well as physical, network capabilities, including "information 'used in the

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[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 (1996), *motion for stay denied,* 11 FCC Rcd. 11754, *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19734 (1996), *further recon. pending, vacated in part sub nom.* Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.,* slip op. (8th Cir. July 18, 1997), *partial stay granted* 109 F.3d 1418 (1996), *stay lifted in part* (Nov. 1, 1996), *motion to vacate stay denied* 117 S.Ct. 429 (1996).

[16] Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.,* slip op. (8th Cir. July 18, 1997)

[17] 47 U.S.C. § 153(45).

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 258.

[19] Id.

transmission, routing or other provision of telecommunications services."[20] Indeed, the Commission expressly noted that "embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it.[21] Finally, the Commission specifically identified "shared transmission facilities" as a network element.[22]

The Eighth Circuit agreed with the Commission that "network elements are not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B."[23] The Court recognized that "facilities or equipment" as used in Section 153(45) "encompasses a broad range of telecommunications technology and devises," including "software systems and accompanying databases."[24] Moreover, the Court rejected contentions that "[s]imply because . . . capabilities can be labeled as 'services' . . . they were not intended to be unbundled as network elements."[25] Indeed, the Court acknowledged that "a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale.[26] While the Court overruled the Commission's mandate that incumbent LECs recombine network elements purchased on an unbundled basis, no where did it authorize incumbent

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[20] Id. at ¶¶ 260 - 61.

[21] Id. at ¶ 260.

[22] Id. at ¶ 440.

[23] Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.*, slip op. at 131.

[24] Id. at 131 - 32.

[25] Id. at 133.

[26] Id.

LECs to strip from network elements logical features, functions and capabilities.[27]

In short, neither Section 251(c)(3), the Commission's Local Competition Order or the Eighth Circuit's decision in Iowa Utilities Board v. FCC support U S WEST's view that "the unbundling provisions of the statute entitle a new entrant to identify and obtain access to dedicated facilities or capacity on a route-by-route basis within an incumbent's network."[28] Many of the network elements recognized by the Congress, the Commission and the Court cannot be used on a dedicated basis, and must be purchased on a transactional or "minute-by-minute" basis. Switching, signaling, database access and operational support systems, to name a few, all require transactional usage. Nor do these authorities support U S WEST's claim that use of the same routing tables and transport links an incumbent LEC uses to route its own traffic would constitute a "service" rather than a network element or, if a network element, an impermissible directive to the incumbent LEC to recombine network elements. Routing tables are resident in incumbent LEC switches and constitute, features, functions and capabilities of such switches. As such routing tables are an integral part of a network element and, therefore, cannot be disaggregated. U S WEST's assertion that network elements are combined and recombined with each call is nothing more that a transparent way of arguing that routing tables can be separated from network elements and withheld from new entrants.

With respect to U S WEST's contention that the *Third Reconsideration* "eviscerates the distinction between the unbundled element and resale options," the carrier is simply wrong. As the Commission and the Eighth Circuit have recognized, "carriers using solely unbundled network

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[27] Id. at 141.

[28] U S West Petition at 11 - 12.

elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents," but in addition to these "greater competitive opportunities" will "face greater risks" -- namely, "the risk that end-user customers will not demand a sufficient number of services . . . for the carrier to recoup its costs."[29] U S WEST is mistaken in its belief that a requesting carrier taking shared transport as a network element bears no greater risk than a new entrant engaged in resale.

As the Commission correctly notes, a carrier purchasing shared transport as a network element must also take local switching and bear the risks attendant thereto.[30] Moreover, that carrier will also bear the risks of the other network elements it must obtain in order to serve its local exchange/exchange access customers, including loop and other dedicated facilities. A resale carrier purchases an end-to-end service from the incumbent LEC; the carrier relying upon unbundled network elements must create a "virtual network" to provide the same service. Each component of that virtual network carries with it additional risks. Indeed, it is because of the substantial risk and far greater investment associated with use of unbundled network elements that virtually all of TRA's members providing local service have opted for resale as an initial entry vehicle.

In short, U S WEST has shown no likelihood that it will prevail on the merits of its appeal.

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[29] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 332, 334; Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.*, slip op. at 144 - 45.

[30] Third Reconsideration, FCC 97-295 at ¶ 47.

B. U S WEST has Not Satisfied the Other Showings Necessary to Warrant The Extraordinary Relief Requested.

The three remaining requirements for grant of a stay include an analysis of the public interest, a balancing of interests among the parties, and a demonstrable showing of irreparable harm by the party seeking the stay. As noted previously, a failure by a party seeking a stay to make a threshold showing under any one of the four criteria is generally fatal. Here, U S West has failed to demonstrate any credible basis for prevailing on the merits of an appellate challenge to the *Third Reconsideration.* A detailed discussion of the remaining factors is therefore not required.[31]

Initially, U S WEST's claim that it will be irreparably harmed -- *i.e.,* new entrants will be able "to underprice USWC and attract away its customers"[32] -- cannot be sustained. As the Commission has oft declared, "'[t]he key word' in an analysis of irreparable harm is 'irreparable.'"[33] "Economic loss does not, in and of itself, constitute irreparable harm."[34] "[C]ompetitive harm is merely a type of economic loss."[35] "[R]evenues and customers lost to competition which can be regained through competition are not irreparable."[36]

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31 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 23.

32 U S WEST Petition at 16.

33 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

34 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216, ¶ 30 (released June 18, 1997).

35 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

36 Id.

Second, Congress has made clear that the public interest lies in "opening the local exchange and exchange access markets to competitive entry."[37] "Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."[38] To facilitate "the opening of one of the last monopoly bottleneck strongholds in telecommunications," Congress provided for three distinct paths of entry into the local market -- the construction of new networks, the use of unbundled network elements of the incumbent's network, and resale."[39] The Congress "neither explicitly nor implicitly express[ed] a preference for one particular entry strategy;" indeed, it required the Commission "to implement rules that . . . remove economic impediments to each."[40]

As the Commission has recognized, limiting "shared transport to dedicated transport facilities" would impose a significant economic and operational barrier to use of the unbundled network element entry strategy.[41] Because "[t]he incumbent LECs have economies of density, connectivity, and scale . . . [which] traditionally . . . have been viewed as creating a natural monopoly," Congress determined that "the local competition provisions of the Act require that these

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37 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 3.

38 Id. at ¶ 4 (emphasis added).

39 Id. at ¶¶ 4, 12.

40 Id. at ¶ 12.

41 Third Reconsideration, FCC 97-295 at ¶¶ 50 - 51.

economies be shared with entrants."[42] The Commission's treatment of shared transport allows competitive providers to share the economies inherent in the incumbent LECs' network infrastructure; U S WEST's approach would deprive them of this opportunity. Indeed, if U S WEST's view were to prevail, unbundled network elements would cease to be a viable entry vehicle for all but the largest carriers. As the Commission has detailed, "the costs of dedicated transport facilities linking every end office and tandem in a incumbent LEC's network . . . relative to the cost of 'shared transport'" would be present a huge economic hurdle, particularly for smaller providers. The Commission is correct that "limiting shared transport to dedicated facilities . . . would be unduly burdensome for new entrants."

In short, a stay "would needlessly and seriously delay the development of local competition -- in direct contravention of the goals Congress sought to achieve in the 1996 Telecommunications Act."[43] The public interest and the balance of interest factors then weigh heavily against U S WEST whose principal intent appears to be avoidance of competition. Given that the "competitive harm" U S WEST fears does not constitute the irreparable harm necessary to warrant the extraordinary relief the carrier seeks, U S WEST's request for a stay simply cannot stand.

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[42] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 11.

[43] Access Charge Reform ("First Report and Order"), CC Docket No. 96-262, FCC 97-158 (May 16, 1997), *pet. for stay denied* FCC 97-216, ¶ 38 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997).

III. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to summarily deny the Petition for Stay Pending Judicial Review filed by U S WEST in the captioned proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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